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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. ~~1989~~ 207

LARRY E. WEBB,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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28 U.S.C. 1254.1 2

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I

Larry E. Webb prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the above case on April 21, 1966, a petition for rehearing being denied by that Court on May 16, 1966.

II

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit rendered and filed its opinion on April 21, 1966, not yet reported, a copy of which is printed as an appendix to this petition. A petition for rehearing was denied by that Court on May 16, 1966; a copy of the order denying the petition for rehearing is printed as an appendix to this petition.

III

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 21, 1966, and a petition for rehearing was denied on May 16, 1966. The jurisdiction of this Court is invoked under Title 28, Sec. 1254.1, U.S.C.,

IV

QUESTIONS PRESENTED

No. 1: Where an indictment charges a defendant with conspiracy to possess and transport 150 gallons of non-taxpaid whiskey, is proof from which the jury might perhaps have inferred that he knew of the existence of the whiskey in the possession of an alleged co-conspirator sufficient to support a conviction?

No. 2: Is it error for the Trial Court to charge the jury in a conspiracy case that it is necessary for them to convict at least two of the defendants when the evidence clearly shows that one defendant committed the substan-

tive offense which was the object of the conspiracy and the evidence further shows that he at all times was accompanied by an unidentified individual.

No. 3: In a case where the jury convicted a defendant of the substantive offense of possession and transportation of nontaxpaid whiskey on February 23, 1964, on legally insufficient evidence and also convicted the defendant of conspiracy to possess and transport such whiskey, was it prejudicial error for the government, over objection of the defendant, to repeatedly refer to an individual who met with defendant on January 19, 1964, as a "Bootlegger" and that the government had information that an automobile received by defendant from said "Bootlegger" was used to transport nontaxpaid whiskey, which incompetent evidence was the only evidence which attached a sinister significance to the acts of defendant?

V

This case involves the administration of justice in a federal criminal case.

VI

STATEMENT

Petitioner was convicted on a two-count indictment charging in the first count that he conspired with four named persons and other persons to the grand jury unknown to transport and possess 150 gallons of nontaxpaid whiskey, and on the second count of the substantive offense of possession and transportation of 150 gallons of nontaxpaid whiskey on February 23, 1964.

The United States Court of Appeals for the Sixth Circuit held that the evidence was insufficient to support a conviction on the second count of the indictment charging the substantive offense, but held that the evidence was sufficient to support the conviction on the conspiracy count.

The proof disclosed that petitioner was in the used car business in Cocke County, Tennessee, and regularly drove to Cleveland, Ohio, to pick up cars and transport them to Tennessee, and that during the period between April of 1963 and February of 1964 he purchased approximately 120 cars in Cleveland, Ohio, and transported them to Tennessee. That he on June 25, 1963, purchased a 1956 Chrysler two-door white automobile in Cleveland which he sold to his co-defendant, Donald Leroy Plemmons on October 21, 1963. Plemmons registered this automobile in the states of Tennessee and Ohio, obtaining Tennessee license No. 44-5627 and Ohio license No. 8770-AB. Petitioner on November 5, 1963, purchased another 1956 Chrysler automobile in Cleveland, Ohio, yellow and white in color which he sold to his co-defendant Donald Leroy Plemmons on February 21, 1964. Plemmons registered this automobile in the state of Tennessee.

The government's evidence disclosed that on January 19, 1964, petitioner and his co-defendants Plemmons and Mary Edith Stokley met with an individual named Charles Butler at the A-1 Liquor Store parking lot in Covington, Kentucky. That Plemmons got out of petitioner's automobile and into the 1956 white Chrysler bearing Ohio license No. 8770-AB and proceeded to an Amoco service station in Lexington, Kentucky. That at Lexington, Kentucky, petitioner assisted Plemmons in removing a set of overload springs from the 1956 Chrysler automobile and Plemmons obtained Tennessee license tag 44-5627

from petitioner's automobile and placed the same on the 1956 Chrysler after removing the Ohio plates. Petitioner further paid the bill at the Amoco service station in the amount of $11.07. No evidence was introduced to prove any violation of the Federal Internal Revenue Laws on January 19, 1964.

During the course of the trial the following occurred concerning the events on January 19:

During the opening statement of the United States Attorney the following occurred:

> "We will show that this car was driven to that parking lot by a man from Cincinnati by the name of Charles Butler, who was and is a well-known liquor law violator.
>
> "MR. DUGGER: If the Court please, I am going to object to that.
>
> "THE COURT: Objection sustained.
>
> * * *
>
> "THE COURT: Now, members of the jury, you will not consider the statement made by the District Attorney with reference to any reference to the man there, he is not indicted." (15a*)

During the course of Investigator Rehling's testimony who testified in detail of following Butler on the 19th the following occurred:

> "Q What did you do following the time about which you have just testified?
>
> "A If I may—well, that was about 7:30 a.m.,

---

* "a" numbers refer to pages of Appendix for Defendant-Appellant in the Court of Appeals.

about 8:30, between 8:30 and 9:00 a.m., one Charles Russell Butler, who is known to me——

"MR. DUGGER: If the Court please, I object to any testimony about Charles Russell Butler. He is not on trial here.

"THE COURT: Overruled." (33a)

During the testimony of Investigator Laggenbauer concerning the events of January the 19th, the following occurred:

"Q All right. Now, would you tell us what you observed there at about 12:00 noon on January 19th, 1964?

"A I observed a white Chrysler on which I had information had been hauling whiskey into the——

"MR. DUGGER: If the Court please, I want to object to the information——

"THE COURT: Objection sustained.

"Do not consider that statement, members of the jury. Just tell what you did." (47a)

"Q Did you know that person?

"A That was Charles Butler, a twice-convicted liquor law violator in Cincinnati.

"MR. DUGGER: If your Honor please, I am going to object to that.

"THE COURT: Objection sustained.

"Just disregard that statement.

"MR. CLINE: May we approach the bench?

"Reporter's note: The following occurred at the

bench, in the immediate presence of counsel and the Court, in the presence but out of the hearing of the jury:

"MR. CLINE: If your Honor please, we didn't solicit that answer, but we feel that the government does have a right to show that this individual who was making a contact there was one who is a known liquor law violator and has a record of conviction, in order to show the purpose.

"THE COURT: No, they would have a right to come in and bring witnesses to prove that he wasn't a known violator. You may draw that inference in your case, but he is making voluntary statements here, any more than if he says this man was engaged in operating a slot machine some place, you wouldn't be permitted to show that. The very reason that you want to show it is the very reason it is not competent. You want to show it because he is an underworld character and they would have a right if that were the law to bring in evidence to rebut it to show that he wasn't in the same place and didn't have an underworld reputation. I sustain the objection.

"MR. DUGGER: If the Court please, I ask the Court to instruct the jury to disregard that remark.

"THE COURT: I did.

"MR. DUGGER: This is the third time that this has been done during the trial.

"THE COURT: If the witness will just answer the question and not—I think I did instruct them" (48a-49a).

The proof further disclosed that on February 23, 1964,

petitioner rode as a passenger in his automobile driven by his co-defendant, Mary Edith Stokley, and accompanied by his co-defendants, Billy Bruce Allen and Jay V. Ball, on the interstate highway between Lexington, Kentucky, and Covington, Kentucky, and that his automobile passed the second 1956 Chrysler automobile driven by his co-defendant Plemmons, who was accompanied by an unidentified individual. That petitioner's automobile arrived at the A-1 Liquor Store parking lot in Covington, Kentucky, approximately five minutes ahead of the 1956 Chrysler driven by Plemmons. That the Chrysler parked fifteen to twenty feet from petitioner's automobile and several men proceeded from both automobiles to the Daniel Boone Bar across the street from the parking lot. The 1956 Chrysler bore Ohio license tag No. 8770-AB registered to the first 1956 Chrysler sold to Plemmons. The Chrysler was searched and 150 gallons of nontaxpaid whiskey was found with two cases sitting on the rear seat with the whiskey plainly visible.

Petitioner was arrested in the Daniel Boone Bar and a pistol in his possession was introduced in evidence over his objection. He and Plemmons both had the telephone number of the Amoco service station in Lexington, Kentucky, in their possession.

The two passengers in petitioner's automobile on February 23, Billy Bruce Allen and Jay V. Ball, were both acquitted. Allen was granted a judgment of acquittal by the District Court and Ball was acquitted by the jury. Government agents gave conflicting testimony that Ball had a key to the trunk of the Chrysler automobile in his possession. The defendant, Mary Edith Stokley, was convicted on the conspiracy count but the Sixth Circuit Court of Appeals reversed and ordered a judgment of acquittal on the ground that the evidence was insufficient.

VII

REASONS FOR GRANTING WRIT

(1) The first count of the indictment charged that from January 19, 1964, and continuously to February 23, 1964, petitioner and four named individuals and divers other persons to the grand jury unknown conspired to possess and transport 150 gallons, more or less, of nontaxpaid whiskey.

The United States Court of Appeals for the Sixth Circuit held that the evidence was insufficient to support petitioner's conviction on the second count of the indictment which charged that he and the other four named individuals possessed and transported 150 gallons, more or less, of nontaxpaid whiskey on February 23, 1964.

The Court of Appeals in its opinion affirming petitioner's conviction on the conspiracy count said:

> "While there is testimony from which the jury might have found that Webb was still in the A-1 Liquor Store parking lot when Plemmons arrived (Webb denied this) and hence the jury might perhaps have inferred that Webb knew of the whiskey in the back seat of Plemmons' car, such knowledge would not of itself represent an act of possession or transportation."

The indictment fully and clearly set forth the purpose or object of the conspiracy as being to possess and transport 150 gallons of nontaxpaid whiskey as is required. *Pettibone vs. United States*, 148 U.S. 197, 203, 13 S. Ct. 542, 545; *Russell vs. United States*, 369 U.S. 749, 765, 8 L. Ed. 2d 240, 82 S. Ct. 1038. Thus the petitioner was informed by the indictment that he must be prepared to defend against a conspiracy with a limited purpose

charged and not to defend against a conspiracy to violate the Internal Revenue Laws relating to nontaxpaid whiskey generally.

This Court has held that in order to convict a party of participation in a conspiracy that evidence of his knowledge of the object or purpose of the conspiracy must be clear and not equivocal. *United States vs. Falcone*, 311 U.S. 205, 85 L. Ed. 128, 61 S. Ct. 204; *Direct Sales Company vs. United States*, 319 U.S. 703, 711, 87 L. Ed. 1674, 1681; *Ingram vs. United States*, 360 U.S. 672, 3 L. Ed. 2d 1503, 1508, 79 S. Ct. 1314.

Even though the only proof in the record of the possession and transportation of 150 gallons of nontaxpaid whiskey, or of any nontaxpaid whiskey, was the 150 gallons possessed and transported by petitioner's co-defendant Plemmons on February 23, 1964, the Court of Appeals affirmed the conviction of petitioner on proof that "the jury might perhaps have inferred that Webb knew of the whiskey in the back seat of Plemmons' car."—

The Court of Appeals also stated that the fact petitioner had a pistol in his possession when arrested was evidence of his guilt. This evidence was objected to in the District Court and the objection overruled. Petitioner contends that the evidence was inadmissible and under no circumstances should be used by a Court of Appeals as a reason for affirming a conviction when the evidence was in no way related to the charge of conspiracy to possess and transport nontaxpaid whiskey. *Landsdown vs. United States*, (C.A. 5, 1965), 348 F. 2d 405.

(2) The District Court charged the jury on two occasions that it was necessary for them to find at least two of the defendants guilty on the conspiracy count and that

they could not, under the evidence in this case, find one defendant guilty and the others not guilty, which charge was objected to by the defendants.

The indictment charged that the named defendants conspired with persons to the grand jury unknown and the proof was clear and uncontradicted that the defendant Donald Leroy Plemmons drove the 1956 Chrysler automobile on the interstate highway from Lexington, Kentucky, to Covington, Kentucky, and that he possessed and transported 150 gallons, more or less, of nontaxpaid whiskey in said automobile, and further that of this amount two cases of nontaxpaid whiskey was sitting on the rear seat of the automobile with the whiskey plainly visible. The proof was also clear and uncontradicted that Plemmons was at all times accompanied by an unidentified individual who was not arrested.

Petitioner contends that the jury could have found that Plemmons conspired with the unidentified individual who at all times accompanied him in the 1956 Chrysler automobile and that the Court's charge in effect forced the jury to find petitioner guilty in order to find Plemmons guilty on the conspiracy count. *Martin vs. United States*, (C.C.A. 2, 1927), 17 F. 2d 82.

(3) The fact that the jury in this case convicted the defendant, Mary Edith Stokley, on the conspiracy count on legally insufficient evidence and the fact that the jury convicted petitioner on the substantive count on legally insufficient evidence indicates that something happened during the course of the trial to create prejudice against these two defendants.

This Court in *Kotteakos vs. United States*, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L. Ed. 1557, said:

"If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The evidence as to the events on January 19, 1964, showed only that petitioner, Mary Edith Stokley and Plemmons met an individual named Charles Butler in Covington, Kentucky, and that Plemmons got out of petitioner's automobile and received the first 1956 Chrysler from Charles Butler and drove the same to Lexington, Kentucky, where petitioner helped remove overload springs and paid a gasoline bill of $11.07. That Plemmons removed a set of Tennessee license plates from petitioner's car and placed them on the 1956 Chrysler after removing a set of Ohio plates.

As set out in the statement of facts the government repeatedly referred to Charles Butler as a "Bootlegger" and on one occasion a government agent stated that he had information that the Chrysler automobile was being used to haul nontaxpaid whiskey. This incompetent evidence was the only evidence which gave a sinister significance to the events on January 19, 1964.

Petitioner contends that he was prejudiced by the government's deliberate interjection of this incompetent evidence and that an offhand remark to "just disregard that statement" was not sufficient to eliminate any such

prejudice especially in view of the fact that the government's case was extremely weak as attested by the fact that the Court of Appeals held that the evidence was insufficient to support a conviction on the substantive count.

VIII

CONCLUSION

For the foregoing reasons petitioner contends that his petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NOS. 16,494-95

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY E. WEBB,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY EDITH STOKELY,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky, at Covington.

Decided April 21, 1966.

Before: PHILLIPS, EDWARDS and CELEBREZZE, Circuit Judges.

EDWARDS, Circuit Judge. These are appeals from jury verdicts of guilty on indictments charging federal liquor law violations. Count One charged violation of 18 U.S.C. §371 by conspiring to possess and transport 150 gallons of non-tax-paid whiskey. Count Two charged violation of 26 U.S.C. §5205(a)(2) by possession and

transportation of said whiskey. Defendant Webb was convicted on both counts. Defendant Stokely was convicted on the conspiracy count only.

The principal question in the case is whether or not the proofs which were offered were legally sufficient to sustain the convictions of appellants.

These facts are in the record. Both defendants were from Cocke County, Tennessee. Defendant Webb was in the used car business and regularly drove to Cleveland to pick up cars and transport them south. Defendant sold to one Plemmons two 1956 Chryslers, one in October 1963, and one on February 21, 1964. Ultimately 150 gallons of whiskey was found in the second of these 1956 Chryslers.

Government agents testified that on January 19, 1964, Plemmons and Webb (with Stokely) were seen together in an Amoco gas station in Lexington. Webb and Plemmons were working on the first of Plemmons' Chryslers, taking off heavy duty rear springs. The evidence bearing on the conspiracy charge pertaining to this date was supplied chiefly by a Treasury agent named Guernsey:

"A As a result of this call, I went out on New Circle Road—that is in Fayette County—to the vicinity of 647 New Circle Road, the American Oil Station. I arrived there at approximately 2:30 p.m. Upon arriving I observed a 1964 Pontiac, Bonneville, bearing Tennessee dealer plate 46D25. This car was occupied by Larry Webb and Mary Edith Stokely.

"Q Who was driving?

"A Larry Webb.

"Q Where was Mary Edith Stokely sitting?

"A The passenger side."

* * *

"A At approximately the same time, the '56 white Chrysler drove into the station and pulled onto the grease rack.

"Q Now, were you able to observe the license of that Chrysler?

"A It was Ohio 8770-AB."

* * *

"Q Did you see who was driving the 1956 white Chrysler?

"A Donald Leroy Plemmons."

* * *

"Q Go ahead and tell us what you saw after that?

"A Saw the white Chrysler upon the grease rack. I was in the office approximately 10, 15 feet from the Chrysler."

* * *

"A Mary Edith Stokely was in the office there and another lady and the service station operator, out under the '56 Chrysler I saw Larry Webb and Plemmons.

"Q What were they doing?

"A Working on the rear of the vehicle. A little later, a few minutes later, I saw Larry Webb with an overload spring in his hand.

"Q Would you describe that to us, please?

"A The spring is—it is a coil spring, commonly used on vehicles carrying heavy loads, particularly on whiskey loads. It is installed on the rear, on the rear springs of the vehicle.

"Q What occurred after that?

"A Webb walked to the rear of the vehicle. I could notice the trunk lid being up, however, I could not see in—what they were doing right at the very

rear of the vehicle. He came back without the coil spring, Webb did, took some wrenches to the glove compartment of the '56 white Chrysler.

"Q Had the car been lowered at that time?

"A Yes, sir, it had been. When I first observed the coil spring, the car was still on the rack, with the rack raised.

"Q What did Webb do with these wrenches?

"A Placed them in the glove box of the Chrysler.

"Q What at that time happened?

"A Plemmons then walked out to the '64 Pontiac and from the passenger side obtained some license plates, took—

"Q From where on the passenger side?

"A From under the seat.

"Q Did you see those license plates?

"A I saw the plates, however, I didn't read the numbers at that particular time.

"Q Did you see them at a later time?

"A I did.

"Q So that you can tell us the number, if you were able to see them?

"A '63 Tennessee, 445627.

"Q Where did you see that plate?

"A This plate on the same '56 Chrysler.

"Q By whom had it been placed on the '56 Chrysler?

"A I am not certain. The only person in the station or on the grease rack at that time was Plemmons.

"Q Had the Ohio license which you saw on the vehicle when it pulled into the service station been removed?

"A They had.

"Q All right. Go ahead, then what occurred? Then what happened?

"A Larry Webb came—was in the station with Mary Edith Stokely, paid a bill, he asked the operator how much he owed, he paid a bill in the amount of $11.07. At that time I left the station, got in my car."

* * *

"Q Mr. Guernsey, have you had occasion to determine the telephone number of the service station about which you have just testified?

"A I have."

* * *

"Q Would you tell us the number, if you know, of that service station?

"A 299-9995."

No whiskey was found in connection with the January 19 trip. But the second issue in the case pertains to government testimony (objected to and stricken) to the effect that on that trip Webb was seen talking to a person in Covington identified by government counsel and witnesses as a known bootlegger. And the evidence also identified this first Chrysler as having been seen in the parking lot of the A-1 Liquor Store in Covington, Kentucky (of which more below).

On still another trip on February 23, 1964, Webb and Stokely were seen riding in the same Pontiac along Route I-75 heading north about 100 yards ahead of the second of Plemmons' 1956 Chryslers, which Plemmons was driving. Stokely was driving the Pontiac. Shortly thereafter the Pontiac speeded up and proceeded to Covington, Kentucky, where it pulled into a parking lot at the A-1 Liquor Store. The Chrysler arrived a few minutes later and parked nearby. The testimony indicated that the cars were 15-20 feet apart, with no other cars close by.

Subsequently, federal agents approached the Chrysler, saw in it two cases of whiskey on the floor of the back seat,[1] and arrested all the people concerned, including Webb and Stokely. Subsequently, they searched the trunk of the Chrysler and found a total of 150 gallons.

The 1956 Chrysler in which the whiskey was found (very similar in appearance to the first 1956 Chrysler) had on it Ohio plates previously issued to and carried by the other 1956 Chrysler, which had been observed in the January 19, 1964, episode. It also had oversized rear springs.

When he was arrested, Webb was in the Daniel Boone Bar, approximately 100 yards away from the parking lot where the two cars were located and within view of them. He was drinking beer with Donald Plemmons, driver of the whiskey car, and Jay V. Ball, who had ridden to Covington with Webb in the Pontiac. Both of these men were defendants in the trial below. Ball was acquitted; Plemmons was convicted on both counts but is not an appellant here.

Treasury Agent Rowe testified as to the events of the arrest:

"Q Did you have any conversation with Larry Webb or either of the other men that you saw there?

"A I approached Larry Webb and identified myself as a federal officer and asked him if his name was Larry Webb and at that time he stated that it was not. I asked him a second time if it wasn't true that

[1] The facts testified to by the agent were such as to convince him and the Court that the whiskey was non-tax-paid. No issue is presented as to the seizure on this appeal.

his name was Larry Webb and he denied it and as I turned to talk to one of the other two men standing there, Mr. Webb said, 'That is correct. My name is Larry Webb.'

"Q Did you make any revelation to him at that time as to what your business was?

"A We informed him that we had seized his vehicle, seized the 1956 Chrysler, and a hundred gallons of moonshine across the street and that he was under arrest."

* * *

"A . . . I told Larry Webb and the other defendants to empty their pockets and to place everything on the hood of one of the cars that was setting there. I am not sure which one. And at that time Larry Webb reached in and with his thumb and forefinger of his right hand and drew out a loaded .32 caliber Smith & Wesson revolver."

Webb testified that he had agreed to meet Plemmons at the A-1 Liquor Store and drive him to Cleveland, but that he knew nothing about the whiskey. He also flatly denied that Plemmons was at the Amoco station with him on January 19, 1964. He claimed he carried the gun for protection on his used car buying trips.

The government contends that Webb was convoying the whiskey when seen on Interstate 75 and that he was "arrested at Covington, Kentucky, in possession of 150 gallons of moonshine whiskey." The government also contends that there is ample evidence of "a brilliantly conceived and highly organized operation" so as to support the conspiracy convictions of Webb and Stokely.

On review of a conviction based on jury verdict, our court does not, of course, weigh disputes in evidence,

but views the disputed facts (and proper inferences therefrom) from the point of view favorable to the government which accords with the jury decision. *Zottarelli v. United States*, 20 F. 2d 795 (C.A. 6, 1927), *cert. denied*, 275 U.S. 571 (1927); *Holmes v. United States*, 134 F. 2d 125 (C.A. 8, 1943), *cert. denied*, 319 U.S. 776 (1943); *Isaacs v. United States*, 301 F. 2d 706 (C.A. 8, 1962), *cert. denied*, 371 U.S. 818 (1962).

We will deal first with Webb's conviction for possessing and transporting non-tax-paid liquor. We believe Webb's conviction on this count must be set aside. No whiskey was ever found in an automobile owned by Webb or driven by him or in which he was riding. We are cited no proof of an act of Webb which amounted to an exercise of dominion over the 150 gallons of whiskey found in Plemmons' second Chrysler.

While Webb's Pontiac was observed 100 yards ahead of the Plemmons whiskey car, there is no evidence that the two cars stayed together for any appreciable time. "While there is testimony from which the jury might have found that Webb was still in the A-1 Liquor Store parking lot when Plemmons arrived (Webb denied this) *and hence the jury might perhaps have inferred that Webb knew of the whiskey in the back seat of Plemmons' car*, such knowledge would not of itself represent an act of possession or transportation." *McFarland v. United States*, 273 F. 2d 417 (C.A. 5, 1960); *McClain v. United States*, 224 F. 2d 522 (C.A. 5, 1955). [Quotation marks and emphasis added.]

The jury found Mary Edith Stokely not guilty on the possession and transportation count; but it found her guilty of conspiracy. We reverse this conviction also. The evidence puts defendant Stokely on the scene of

events which positively or by fair inference could be deemed a part of a moonshine liquor distribution conspiracy. But this record is devoid of any testimony which links defendant Stokely to any integral element of such a plan, except by presence and association. She was on the scene during the events at the Amoco station on January 19, 1964, and during the events of February 23, 1964. But the closest the evidence comes to showing agreement to or participation in such a plan is the fact that she drove the Pontiac on February 23. No whiskey was transported in this car, however, and we cannot agree with the government that the testimony was sufficient to establish the "convoy" theory.

The government brief states flatly that "Webb and Stokely were the financial backers of the enterprise." This may be true, and government counsel may know that it is true, but we are not cited a scintilla of evidence from this record to support this assertion.

Defendant Stokely's unexplained presence during such a series of suspicious events might well justify grave doubts about her role. But neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in a conspiracy. *United States v. Falcone*, 311 U.S. 205 (1940); *United States v. Potash*, 118 F. 2d 54 (C.A. 2, 1941), *cert. denied*, 313 U.S. 584 (1941).

The evidence of conspiracy—even if circumstantial—must be such as to establish beyond reasonable doubt defendant's agreement to or participation in a plan to violate the law. Viewing the proofs from the point of view favorable to the government, which is represented in the jury's verdict, we find no evidence to establish defendant Stokely's agreement to or participation in a

conspiracy to possess or transport non-tax-paid whiskey. *United States v. Grimes*, 332 F. 2d 1014 (C.A. 6, 1964); *Dennert v. United States*, 147 F. 2d 286 (C.A. 6, 1945).

As to defendant Webb's conviction on the conspiracy count, however, we have another matter. As we have noted, no government evidence definitely established any act of dominion over non-tax-paid whiskey on his part. Cf. *United States v. Anderson*, 352 F. 2d 500 (C.A. 6, 1965). Nor do we find any testimony specifically describing his agreement to the scheme (or his conception of it.).

But in Webb's case we do find acts from which participation in and agreement to a plan for possessing and transporting non-tax-paid whiskey might properly be inferred.

The striking parallels between the modus operandi employed by Plemmons on February 23 when he drove a load of whiskey to Covington which was seized and the modus operandi employed by him on January 19 are such as to allow the jury to infer that the events of January 19 represented the return leg of another Cocke County, Tennessee, to Covington, Kentucky, moonshine liquor trip.

With the Chrysler free of whiskey, Webb apparently felt safe in assisting in dismounting the overload springs, in carrying the substitute Tennessee plates in his car, and in paying the garage charges at the Amoco station. The jury properly could have found or inferred that these acts were acts done in concert by conspirators toward a common illegal design. See *American Tobacco Co. v. United States*, 147 F. 2d 93, 107 (C.A. 6, 1944), *aff'd*, 328 U.S. 781 (1946).

In the same category are the facts that defendant Webb, when arrested on February 23, was found in possession of a loaded revolver; that one of the persons who accompanied him to Covington in his Pontiac was found in possession of the key to the Chrysler trunk (where most of the non-tax-paid whiskey was discovered); and that he and Plemmons both had in their pockets memos of the telephone number of the Amoco gas station where they had been observed on January 19.

All of these facts are supplementary to the evidence of presence and proximity and association which taken alone in defendant Stokely's case we held insufficient to establish conspiracy.

This Court has said:

> "Circumstantial evidence, if strong enough to convince the trier of the facts of a defendant's guilt beyond a reasonable doubt, is sufficient to sustain a finding of guilt. Holland v. United States, 348 U.S. 121, 139-140, 75 S. Ct. 127, 99 L. Ed. 150; United States v. Comer, 288 F. 2d 174, 175, C.A. 6th cert. denied, 366 U.S. 925, 81 S. Ct. 1351, 6 L. Ed. 2d 384." *United States v. Burch*, 313 F. 2d 628, 629 (C.A. 6, 1963).

And the United States Supreme Court has detailed the rationale behind the circumstantial evidence rule pertaining to conspiracies:

> "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with

it, without requiring evidence of knowledge of all its details . . ." *Blumenthal v. United States*, 332 U.S. 539, 557 (1947).

We hold that the proofs as to defendant Webb constituted circumstantial evidence from which the jury properly could have found beyond reasonable doubt that he agreed to and participated in a conspiracy to possess and transport non-tax-paid whiskey. *United States v. Anderson*, *supra*; *American Tobacco Co. v. United States*, *supra*; *Blumenthal v. United States*, 158 F. 2d 883 (C.A. 9, 1946), *rehearing denied*, 158 F. 2d 762 (C.A. 9, 1947), *aff'd*, 332 U.S. 539 (1947); *United States v. Miller*, — F. 2d — (C.A. 6, 1966), Decided April 1, 1966.

Careful consideration of this record discloses no other error in judicial rulings or the jury charge.

Government counsel and one government witness were overeager to define the role of the person whom Webb and Plemmons contacted in Covington on January 19. The District Judge sustained objections to the proffer of hearsay description of that role and told the jury to disregard it. No motion for mistrial on grounds of prejudice was made then, nor are we persuaded from this whole record that such prejudice resulted. We find no error affecting substantial rights of defendant Webb. Rule 52 Fed. R. Crim. P.

The conviction of defendant Stokely on Count One is reversed, the sentence is vacated, and the case is remanded to the District Court for entry of a judgment of acquittal.

The conviction of defendant Webb on Count Two is reversed, the sentence is vacated, and the case is remanded to the District Court for entry of judgment of acquittal.

The conviction and sentence of defendant Webb on Count One is affirmed.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16,494

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LARRY E. WEBB,
Defendant-Appellant.

} ORDER

(Filed May 16, 1966)

Before: PHILLIPS, EDWARDS and CELEBREZZE,
Circuit Judges

On receipt and consideration of a petition for rehearing in the above-styled case, the same is hereby denied.

Entered by order of the Court

/s/ Carl W. Reuss
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 207

LARRY E. WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 359 F. 2d 558.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1966. A petition for rehearing was denied on May 16, 1966 (Pet. App. B). The petition for a writ of certiorari was filed on June 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

223-453—66

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction of conspiracy.

2. Whether the court erred in instructing the jury that, under the evidence, it could not find one defendant guilty and all of the others not guilty on the conspiracy charge.

3. Whether the court adequately instructed the jury to disregard references to a third person, seen with petitioner, as a known liquor law violator.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Kentucky of conspiracy to possess and transport illicit whiskey and was sentenced to three years' imprisonment (App. 3a–6a, 158a).[1] On appeal, the conviction was affirmed.[2]

Petitioner, a Tennessee used car dealer (App. 85a), conveyed a 1956 Chrysler to codefendant Plemmons on October 21, 1963 (App. 24a–26a, 28a–29a). On January 19, 1964, this Chrysler, equipped with coil or booster type springs for carrying heavy loads and bearing an Ohio license plate, was driven by one But-

[1] "App." refers to the Appendix to petitioner's brief in the court of appeals.

[2] The court of appeals reversed petitioner's conviction of the substantive offense of possessing and transporting whiskey in violation of 26 U.S.C. 5205(a)(2) (Pet. App. 25; App. 5a). It also reversed codefendant Stokely's conviction on the conspiracy count (Pet. App. 25). Codefendant Plemmons was convicted on both counts but did not appeal (Pet. App. 19).

ler from Cincinnati to the parking lot of the A–1 Liquor Store at Covington, Kentucky (App. 33a–34a, 45a–46a). There, Butler was observed standing next to a 1964 Pontiac occupied by petitioner and two others (App. 34a, 47a–48a). Butler drove away in another car, leaving the Chrysler in the parking lot. A few hours later, petitioner drove the Pontiac, and codefendant Plemmons drove the Chrysler, to a filling station in Lexington (App. 51a–52a). At the station, petitioner and Plemmons were observed working together on the rear of the Chrysler. Petitioner removed an overload coil spring from the Chrysler, and Plemmons took a Tennessee license plate from under the front seat of the Pontiac and attached it to the Chrysler in place of the Ohio plate (App. 53a–54a). Petitioner then asked the garage owner how much he owed him and paid the bill (App. 55a).

On February 21, 1964, petitioner conveyed a second Chrysler to Plemmons (App. 26a–27a). Two days later, codefendant Stokely, who had been with petitioner during the events of January 19 described above, was seen driving petitioner and two others in petitioner's Pontiac, followed by Plemmons, driving the second Chrysler (App. 36a, 38a, 55a–56a, 64a). The Chrysler bore the same Ohio license number as that borne by the first Chrysler on January 19. The Pontiac was driven to the A–1 Liquor Store's parking lot, and, shortly thereafter, Plemmons parked the Chrysler nearby (App. 37a–38a, 57a). Petitioner, Plemmons and codefendant Ball then went into a nearby tavern (App. 39a, 72a–73a).

Federal agents who had been observing the two cars saw two cases of moonshine whiskey on the rear floor of the Chrysler and arrested codefendants Stokely and Allen, who were sitting in the Pontiac (App. 39a–40a, 58a, 73a–74a).[3] Another agent arrested petitioner, Plemmons and Ball at the tavern and brought them back to the parking lot (App. 40a–41a, 58a–59a, 75a). Upon searching Ball, who had been a passenger in petitioner's Pontiac, the agents found a key to the trunk of the Chrysler. Inside the trunk, they found 150 gallons of whiskey without the required tax stamps (App. 41a, 60a, 78a, 138a). The agents also discovered a loaded revolver in petitioner's pocket (App. 59a, 75a–77a) and two Tennessee license plates under the driver's seat of his Pontiac (App. 63a, 79a). Two sets of overload coil springs were removed from the Chrysler; these were of the same type as those petitioner had removed from the first Chrysler on January 19 (App. 62a–63a).

ARGUMENT

1. There is no occasion for this Court to review the sufficiency of the evidence. It is well settled that participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence (*Delli Paoli* v. *United States,* 352 U.S. 232, 236; *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2)), and there was convincing evidence here from which the jury could reasonably infer petitioner's guilt.

[3] Allen was acquitted by the court, and codefendant Ball was found not guilty by the jury (App. 81a–82a, 159a–160a).

Petitioner sold Plemmons two Chryslers, each of which was equipped on January 19 and February 23 with overload coil springs for carrying heavy loads, such as large quantities of whiskey, and he was with Plemmons under similar circumstances on both of the dates in question. Although no whiskey was seen on January 19, the events of that date—particularly petitioner's removal of the Chrysler's overload springs and Plemmons' replacement of the Ohio license plate with a Tennessee plate taken from inside petitioner's Pontiac—strongly suggest a close collaboration between petitioner and Plemmons. As the court of appeals observed, "The striking parallels between the modus operandi employed by Plemmons on February 23 when he drove a load of whiskey to Covington which was seized and the modus operandi employed by him on January 19 are such as to allow the jury to infer that the events of January 19 represented the return leg of another * * * moonshine liquor trip" (Pet. App. 23).

On February 23, Plemmons followed petitioner to the parking lot which was the scene of a similar rendezvous on January 19. Ball, a passenger in petitioner's car, had a key to the trunk of the Chrysler in which the illegal whiskey was found, and petitioner had a loaded revolver, which was properly admitted as relevant to the issue of knowledge. In view of all the circumstances, it was proper for the jury to conclude that petitioner knew of the liquor in the Chrysler and engaged in a conspiracy to possess and transport it.

2. The trial court instructed the jury that it could not find one defendant guilty and all the others not guilty on the conspiracy count because there was no evidence that any defendant had conspired with anyone other than a codefendant (App. 143a, 152a–153a). Petitioner objected on the ground that, since there was evidence that an unidentified man was in the Chrysler with Plemmons on February 23, the jury was free to find that the only conspiracy was between one defendant and this unidentified person (App. 156a–157a). Out of the presence of the jury, the court commented as follows (App. 156a):

> I don't think so. I don't find anything, any proof against anyone other than these men named in this indictment. If there are others, which—I am not saying there were, there were probably others, too, but I don't think there is anything in this proof to justify the court saying, "You might find somebody else." There is no proof that there was anybody else, no telephone calls to any unknown persons, there is no identity of any unknown person except seeing somebody ride in the automobile just like Allen and we [directed a verdict of acquittal in his case.] * * *

There is no substance to petitioner's argument that the court's charge, which eliminated consideration of the unidentified passenger, in effect forced the jury to find petitioner guilty in order to convict Plemmons

on the conspiracy count. The jury, which convicted Miss Stokely and acquitted Ball (App. 158a), obviously considered the extent to which they regarded each defendant involved with Plemmons.[4]

3. Petitioner also seeks to overturn his conviction on the basis of references at trial to Butler, whom petitioner met at the liquor store parking lot on January 19, as a known liquor violator. When the prosecutor referred to Butler in this manner in his opening statement, the court sustained petitioner's objection and instructed the jury not to consider the statement (App. 15a–16a). During the examination of agent Laggenbauer, the court also sustained petitioner's objection and explicitly instructed the jury to disregard the witness's unsolicited statement that Butler was "a twice-convicted liquor law violator" (App. 48a). Petitioner's counsel did not ask for a mistrial on account of these remarks, and the court below properly declined to reverse his conviction on this basis. The jury is presumed to have followed the court's clear instructions and to have disregarded the remarks. *Opper* v. *United States,* 348 U.S. 84, 95; *Delli Paoli* v. *United States,* 352 U.S. 232, 242.

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[4] It is clear that *Martin* v. *United States*, 17 F. 2d 82 (C.A. 2), relied on by petitioner, has no application where, as here, all of the identified co-conspirators are tried together. *United States v. McCann*, 32 F. 2d 540, 542 (C.A. 2).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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